

REPORT OF THE GUIDANCE DOCUMENTS SUBCOMMITTEE OF THE ADMINISTRATIVE LAW ADVISORY COMMITTEE

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EXECUTIVE SUMMARY

This report and its proposed legislation are in response to a request from the Virginia Code Commission. The request relates to proposed legislation designed to disclose documents of general applicability which are not "rules" or "regulations" under the Virginia Administrative Process Act (VAPA), (§ 9-6.14:1 et seq). Such documents are often important to understanding the agency's law but are not readily available. Indeed, their existence is often unknown to the public.

The subcommittee recommends legislation which would require agencies to publish in the Virginia Register of Regulations a list of such documents each year. Defined as "guidance documents" in a new term to be added to the VAPA, these documents contain agencies' interpretations of rules, regulations and statutes.

LEGISLATIVE BACKGROUND

During the 1996 Session of the General Assembly, House Bill 1532 was introduced which would (i) include the definition of a "guidance document" in the VAPA, and (ii) require state agencies to publish a list of current guidance documents in the Virginia Register and publish notice whenever a guidance document is adopted, altered, or repealed (Appendix B). Currently, the definition and publication of guidance documents are not addressed in the VAPA.

House Bill 1532 passed the House of Delegates 72-21. Amendments adopted in the Senate Committee on General Laws would apply the requirement only to environmental guidance documents. The Senate Committee on General Laws carried over the bill as amended until the 1997 Session.

The Honorable William C. Wampler, Jr., chairman of the Senate Committee on General Laws, asked the Virginia Code Commission to review the bill. The Virginia Code Commission requested the assistance of the Administrative Law Advisory Committee in studying the potential effects of such legislation and developing a recommendation for the 1997 General Assembly Session. In response, the Administrative Law Advisory Committee created the Guidance Documents Subcommittee to focus on two issues: (i) the language of the definition and (ii) the publication requirement.

The proposed definition in House Bill 1532 is as follows:

"Guidance document means any manual or other document developed by a state agency for official use to provide general direction, instruction or advice to agency employees in determinations regarding permitting activities."

The proposed publication requirements in House Bill 1532 are:

"A. Each state agency shall annually publish a list of guidance documents. Notice of any changes to existing guidance documents shall be published at the time of the change in the Virginia Register of Regulations unless the change is so minor that the agency finds such publication to be impractical or unnecessary.

B. When a state agency proposes to use new guidance documents developed by it, notice of the proposed use shall be published by the agency in at least one issue of the Virginia Register of Regulations before commencing the use."

DESCRIPTION OF THE ISSUES

The VAPA supplements each state agency's basic laws and governs agency actions during the development, promulgation, and application of regulations. Accordingly, unless exempt from the VAPA or different procedures are specified in the agency's basic law, an agency must follow the procedures of the VAPA to promulgate a rule or regulation. A rule or regulation is defined as "any statement of general application, having the force of law, affecting the rights or conduct of any person, promulgated by an agency in accordance with the authority conferred on it by applicable basic laws." (§ 9-6.14:4.F). The

term "promulgate" means to publish or to announce officially. A subject agency's rule or regulation is necessarily invalid if the agency fails to comply with the VAPA and the Virginia Register Act during the promulgation process.

The proposals of House Bill 1532 create significant administrative law changes. For various reasons, agencies use guidance not subject to the promulgation process of the VAPA, in lieu of the promulgation processes specified in the VAPA. "Guidance" includes documents such as manuals, policies, and administrative letters which are developed by the agency, but do not follow the rule making requirements of the VAPA (i.e., public notice and comment). Although these documents do not carry the force of law, guidance materials may indeed affect the public. For example, an agency's policy on completing a permit application influences how the regulation is carried out in everyday practice, and how the public must respond. While this policy does not undergo public notice and comment, the policy nonetheless impacts the public and regulated entities' actions.

The publication of guidance documents also involves the publication of the Administrative Code because the Registrar makes decisions about publishing documents that have not been promulgated as regulations. Moreover, issues are raised regarding (i) the costs and benefits of compiling and updating a list of guidance documents, and (ii) the time required to create, publish, and implement the document. A guidance document is frequently useful simply because of its short implementation time. A middle ground must be met between creating a valuable list for the public's use and interfering with an agency's quick dissemination of helpful guidance materials.

SUMMARY OF FINDINGS

Administrative law has evolved a practical distinction between rules having the force of law, ("legislative rules,") and those having only an advisory function, ("nonlegislative rules," "interpretative rules" or "statements of policy"). Public procedures are generally required for legislative rules but not for nonlegislative rules.

Although Virginia law makes no provision for the issuance of nonlegislative rules, these rules often carry considerable weight. Thus, the argument was raised that agencies should advise the public of the existence of documents disclosing agency pronouncements of general applicability.

At present, the Virginia APA does not contain a term for the designation of these documents. The federal APA, the model state APA, and the acts of sister states in the Fourth Circuit do not provide a definition of such documents. Therefore, the subcommittee developed its own definition.

The subcommittee found that Virginia practice generally referred to these documents as "guidance documents" and chose this phrase for its definition. It then drafted a definition which would provide adequate disclosure to the public without unduly burdening the agencies.

METHODOLOGY

The subcommittee intended to develop a definition and requirement that equally balanced the interests of the public, the regulated entities, and state agencies. The original bill encompassed every agency governed by the VAPA. In accordance with the Administrative Law Advisory Committee's traditional approach to legislative recommendations, the subcommittee applied the proposed definition to all guidance documents and agencies, instead of targeting recommendations to one specified agency and activity. The issues relating to guidance documents used by all agencies are as important as the guidance documents applied in the environmental permitting process, and thus should apply consistently.

The subcommittee completed the following activities:

1. Reported on the collection of guidance materials to learn how an agency classifies its own documents. Documents compiled in accordance with the requirements of Chapter 735 of the 1993 Acts of the Assembly were studied for this stage (Appendix C).
2. Surveyed eight selected agencies and their regulated communities to solicit opinions on the proposed language of House Bill 1532 (Appendix D).
3. Compiled materials written by administrative law commentators that discuss the different categories of administrative rules (Appendix E).

4. Researched and compared federal and other states' administrative process acts' approaches to the issues raised by guidance documents (Appendix F).

1. Survey of Existing Archives

The subcommittee felt that it should sample a broad range of documents produced by Virginia agencies in order to determine the scope of its recommendations. The agency response to Ch. 735 provided a sample group. Chapter 735 required agencies to file with the Registrar every document the agency currently enforced (Appendix C).

Agencies submitted various rules or regulations and written statements such as resolutions, administrative letters, directives, state plans, manuals, policies, procedures, and guidelines (Appendix G). A few agencies submitted intra-office memoranda. The subcommittee found many of these written statements were the "guidance documents" House Bill 1532 originally sought. Most of the submissions were a type of guidance material; only three agencies needed to promulgate their submission as a rule or regulation (Appendix C).

The study reveals the large number of documents which could be perceived as guidance documents. Many of the written statements submitted would be encompassed by the subcommittee's proposed definition of guidance documents.

2. Survey of Agencies and Regulated Community

The subcommittee developed a survey to discover the need for, and application of, the proposed guidance documents (Appendix D). The goals were (i) to determine the efficacy of the definition and (ii) to determine whether compiling a list of those documents would impose a burden on agencies. The definition's language strongly influences the impact of including a guidance document in the VAPA procedures. Broad language may incorporate a wide range of agency-produced documents that have no application to the general public, while too restrictive language could defeat the purpose of the bill.

a. Survey of Agencies

The subcommittee surveyed eight agencies: Department of Agriculture; Department of Corrections; Department of Health; Department of Historic Resources; Department of Mines, Minerals and Energy; Department of Motor Vehicles; Department of Taxation; and Department of Youth and Family Services. Each agency's regulatory coordinator was asked to indicate his/her opinions on the proposed definition and an annual publication requirement.

The definition in the survey read: "A guidance document is any document, other than a rule or regulation, developed by a state agency to provide general direction, instruction, or advice to the agency staff or to the general public."

Most agencies believed that the definition was too vague and over-inclusive. The definition seemingly encompassed documents for which the general public would have no practical use (i.e., intra-agency management memoranda). The agencies desired a narrower, more focused definition that would clearly specify those materials considered guidance documents.

No agency supported a continuously updated publication requirement. The agencies felt the administrative costs would be greater than the benefits. On the other hand, most of the agencies surveyed found acceptable a periodic publication of a list of such documents, if a requirement was imposed (Appendix H).

b. Survey of Regulated Community

The community questionnaire inquired about an affected group's satisfaction with the accessibility of agency documents. The responses of the community members indicated little dissatisfaction with their ability to access information from the agencies.

Respondents felt the agencies sufficiently supplied guidance documents and knew the information was available upon request. Nonetheless, the majority of the respondents believed that wider disclosure of these documents would be valuable. The majority of the community opined that an annual publication of a list of guidance documents would suffice. Several respondents would also require a continuously updated listing (Appendix I).

CONCLUSIONS

Based on the results of the study, the subcommittee concludes that agencies should be required to publish annually in the Virginia Register of Regulations a list of the generally applicable "guidance documents" upon which they rely. The subcommittee also recommends a somewhat narrower definition of that term than that proposed in House Bill 1532.

1. Revised Definition

The subcommittee concluded that the revised definition of guidance documents should address the expressed concerns. All responding agencies voiced concern over the all-inclusive language of the definition which seemed to include any type of intra-agency memorandum, regardless of its application or interest to the public. If the bill's intention was to ensure public access to agency documents, then the language of the definition must be more tailored to specifically pinpoint those types of documents.

The subcommittee recommends the following definition:

"A guidance document is any document developed by a state agency or staff that provides information or guidance of general applicability to the staff or public to interpret or implement statutes or the agency's rules or regulations, excluding agency minutes or documents that pertain only to the internal management of the agency."

The words in the proposed definition were chosen for distinct purposes:

- The delineation between state "agency or staff" corresponds to the definition of agency in the VAPA. By definition, an agency issues only regulations. The inclusion of the term "staff" ensures that the source of the guidance document will not affect the document's label as a guidance document.
- The phrase "general applicability" addresses the broad scope of guidance documents; the term refers to the types of documents that affect the public at large. This phrase excludes case-specific documents that are particular to a certain situation and fact analysis. The committee does not intend for the term "guidance documents" to apply to case decisions unless the agency states that the case decision is intended to have general applicability in similarly situated cases.
- Guidance documents may be those issued to either the "staff or public." Not all documents issued to the staff are necessarily guidance documents; however, those which explain to the staff ways to implement a rule should be included.
- The terms "interpret or implement" describe the role of guidance documents, as compared to duly promulgated agency rules. Guidance documents explain and clarify an existing law; they do not create new obligations or rights as a rule or regulation does.
- Guidance documents expressly exclude those documents that are for the agency's internal use only (such as a memorandum regarding the personnel's parking facilities or bond savings program).

2. Annual Publication of a List

The subcommittee concluded that publishing an annual list of guidance documents is a reasonable requirement and sufficiently provides the public with access to guidance documents.

Although the first compilation may require extra effort, the maintenance of such a list will be less time consuming in the subsequent years. For example, in the summer of 1996, the Department of Environmental Quality voluntarily compiled a list of guidance documents (based on the proposed definition of House Bill 1532). While the decision-makers had some varying opinions on what constituted a guidance document, the list nonetheless was successfully generated by this large agency. After developing the original list, the only maintenance will be to update existing documents, to include new documents, and to remove obsolete ones.

The subcommittee recommends deleting the additional requirements regarding changed and new guidance documents for the following reasons: (i) fewer on-going requirements will ease the administrative burden on agencies and encourage compliance and (ii) too many restrictions may hinder the quick implementation benefits of guidance materials. However, the subcommittee recommends that

the Registrar provide that the publication will specify an agency contact person to provide information on updates and copies of guidance documents. In addition, the Registrar's format should require that the agency indicate the statute or regulation which each guidance document interprets or implements.

The subcommittee did not recommend changes to the existing provisions in the Virginia Register Act for enforcement in the event of an agency's noncompliance with the requirement. The subcommittee concluded that agencies will generally comply with the legislation. Hence, the vast majority of the agencies should not be burdened with enforcement devices aimed at a few possible recalcitrants.

3. Clarification of Access

The subcommittee suggested clarifying the availability of guidance documents for public inspection within the Virginia Register Act. Note however, that the proposed requirement does not impose new obligations on the agencies because the Virginia Freedom of Information Act already requires such access.

RECOMMENDATIONS

1. Based on the foregoing, the subcommittee recommends that the definition of guidance document read as follows:

"A guidance document is any document developed by a state agency or staff that provides information or guidance of general applicability to the staff or public to interpret or implement statutes or the agency's rules or regulations, excluding agency minutes or documents that pertain only to the internal management of the agency."

2. Moreover, because the subcommittee found the issues relating to guidance documents developed by other agencies are as compelling as environmental issues covered by the original bill, the legislation should apply to all agencies subject to the requirements of the Virginia Administrative Process Act and/or Register Act.

3. The subcommittee also recommends the annual publication of a list of guidance documents be maintained. Thus, the requirement will read:

"It shall be the duty of every agency to annually file with the Registrar for publication in the Virginia Register of Regulations a list of any guidance documents upon which the agency currently relies. Such filing shall be made on or before January 1 of each year in a format to be developed by the Registrar."

This statement is based on the premise that any bill will take effect on July 1, 1997 with the first filing on or before January 1, 1998.

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